APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-16188
D.C. No. CV-04-01724-RGS

[Filed April 3, 2009]

In the Matter of: ANDREW D. GLOGOWER,	)
Debtor,	)
SHARON P. CLARK, Liquidator of National Business Association Trust and National Benefit Administrators,	)
Appellant,	)
v.	)
ANDREW D. GLOGOWER,	)
Appellee.	)

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted February 12, 2009
San Francisco, California

MEMORANDUM*

Before: D.W. NELSON, W. FLETCHER and TALLMAN, Circuit Judges.

The Commissioner of the Kentucky Department of Insurance, Sharon P. Clark, serves as Liquidator ("Liquidator") of National Business Association Trust ("NBAT") and National Business Association ("NBA"). The Liquidator appeals the district court's determination that Andrew Glogower ("Glogower") is entitled to a discharge in his Chapter 7 bankruptcy proceeding for payments made to him by NBA. These challenged payments consist of a $362,282.70 bonus payment ("Bonus Payment") and a series of payments totaling $395,000 in partial satisfaction of a promissory note executed between Glogower and NBA ("Loan Payments"). We agree with the bankruptcy court and hold that the Bonus Payment and Loan Payments are non-dischargeable in bankruptcy under 11 U.S.C. § 523(a)(4). We therefore reverse the district court.

"[W]e independently review the bankruptcy court's decision, without giving deference to the district court." *In re Rosson*, 545 F.3d 764, 770 (9th Cir. 2008). "Whether a claim is nondischargeable presents mixed issues of law and fact and is [ ] reviewed de novo." *In re Barboza*, 545 F.3d 702, 706 (9th Cir. 2008).

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

As a threshold matter, we must decide whether the Bonus Payment was properly before the bankruptcy court, as the district court did not reach this issue in its determination. Glogower argues that the issue of dischargeability with regard to the Bonus Payment was outside the scope of the Pretrial Statement and must therefore be excluded from any finding of non-dischargeability. This argument is without merit. The Pretrial Statement specifically lists the Bonus Payment as a stipulated material fact and raises the issue of whether the entire "State Court Judgment"—including the Bonus Payment Judgment—is dischargeable in bankruptcy. This is sufficient to find that Glogower had notice that the Liquidator planned to present evidence with regard to the dischargeability of the Bonus Payment. Because we hold that the issue was properly before the bankruptcy court, we examine the issue of dischargeability with regard to both the Bonus Payment and the Loan Payments.

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." We reject "[t]he broad, general definition of fiduciary—a relationship involving confidence, trust and good faith" in the bankruptcy discharge context. *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986). "Instead, the fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." *In re Lewis*, 97 F.3d 1182, 1185 (9th Cir. 1996). In *In re Hemmeter*, 242 F.3d 1186, 1190 (9th Cir. 2001), we held that a fiduciary under the Employee Retirement Income Security Act ("ERISA") is a fiduciary under § 523(a)(4).

The bankruptcy court correctly determined that Glogower was a fiduciary for purposes of § 523(a)(4) because he was an ERISA fiduciary. NBAT was an ERISA plan. Its Trust Agreement states that it was formed "consistent with [ERISA]." In prior litigation, NBAT took the position that it was an ERISA plan and the District Court for the Western District of Kentucky agreed. *Nat'l Bus. Assoc. Trust v. Morgan*, 770 F. Supp. 1169, 1171, 1175 (W.D. Ky. 1991). Glogower also admitted in his testimony before the bankruptcy court that NBAT was an ERISA plan.

Glogower was an ERISA fiduciary of NBAT. ERISA provides that

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . .

29 U.S.C. § 1002(21)(A). Glogower had total control over NBA as its chief executive officer, chairman of the board, and majority shareholder, and NBA was given a significant amount of discretionary authority over the management and asset disposition of NBAT.

We reject Glogower's argument that because the Bonus Payment and Loan Payments were paid out of a separate administrative account they were not made in violation of his fiduciary duty. The Franklin County Circuit Court of Kentucky determined that NBAT and NBA were one and the same entity. We owe full faith and credit to this factual determination. *See generally Yeoman v. Commonwealth, Health Policy Bd.*, 983

S.W.2d 459 (Ky. 1998). Once the corporate veil has been pierced, there is no legally relevant distinction between the funds used to pay NBA and the funds used to pay beneficiaries.

The bankruptcy court also properly determined that the Loan Payments and Bonus Payments constituted defalcations under § 523(a)(4). The term "defalcation" as used in § 523(a)(4) means either the "misappropriation of trust funds or money held in any fiduciary capacity" or the "failure to properly account for such funds." *In re Hemmeter*, 242 F.3d at 1190. "[N]o intent to defraud is required" to find defalcation. *Id.* The bankruptcy court correctly concluded that Glogower misappropriated funds he held in a fiduciary capacity by "pay[ing] himself when he was fully aware that the entities (NBAT/NBA) he controlled could not pay the claims due the plan beneficiaries."

The judgment of the district court is vacated and the case is remanded with instructions to reinstate the judgment of the bankruptcy court.

REVERSED AND REMANDED.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 04-1724-PHX-RGS
BK-00-06179-PHX-RTB
ADV. No. 00-681

[Filed May 31, 2007]

IN THE MATTER OF Andrew D. Glogower, Debtor,	)
Andrew D. Glogower, Appellant/Cross-Appellee, vs. Janie A. Miller, Appellee/Cross-Appellant.	)

ORDER

Pending before the Court is Debtor Andrew D. Glogower's ("Debtor's") appeal and Liquidator Janie A.

Miller's ("Liquidator's") cross-appeal from a final judgment of the United States Bankruptcy Court entered on July 9, 2004. Following oral argument on December 5, 2005, the Court took the matter under advisement. Having considered the written and oral arguments of the parties, the applicable law, and the record before it, the Court now rules.

I. BACKGROUND

The parties stipulated to the following material facts, as set forth in the Joint Pretrial Statement. [Bankruptcy Docket ("Doc.") # 64]

National Business Association Trust ("NBAT") was an express trust created for the sole purpose of providing healthcare benefits under certain identified health plans. National Benefit Administrators, Inc. ("NBA") was the administrator of NBAT. The Debtor served as secretary and treasurer of NBA from 1982 through 1987 and was appointed chairman of the board and chief executive officer on September 1, 1988.

In September 1988, while acting as director of NBA, the Debtor approved a resolution authorizing execution of a $485,297.30 promissory note from NBA to himself for accrued but unpaid salary. NBA made payments (the "Loan Payments") to the Debtor in partial satisfaction of the promissory note on November 6, 1989, November 8, 1989, December 5, 1989, and April 26, 1990, in the total amount of $395,000.00. In June 1989, while acting as director of NBA, the Debtor approved a resolution authorizing a bonus payment (the "Bonus Payment") of $362,282.70 from NBA to himself.

On June 20, 1991, the Franklin Circuit Court, Commonwealth of Kentucky (the "Kentucky Court"), found that NBAT was an unauthorized insurer doing business in Kentucky, that NBAT was insolvent, and that further transaction of business would be hazardous financially and otherwise to its policyholders, claimants, and other creditors. Accordingly, on that date, the Kentucky Court ordered the liquidation of NBAT.

On May 9, 1995, the Kentucky Court found that NBA had complete and exclusive authority to market NBAT coverage, to set and collect premiums for NBAT coverage, to receive, adjust, and settle claims under NBAT coverage, to execute documents in the name of NBAT, to receive service of legal process on behalf of NBAT as designated agent, and to otherwise transact the business of NBAT. Accordingly, the Kentucky Court found that NBAT "acted through and as one with NBA" and thus were a single entity. On that date, the Kentucky Court found that NBA was insolvent.

On August 31, 1999, the Kentucky Court entered judgment in the amount of $395,000.00 against the Debtor and in favor of the Liquidator. On October 6, 1999, that court amended the judgment to include prejudgment interest, for a total amount of $833,488.00.

The following facts are found in the record. The Debtor filed a Petition for Relief under Chapter 7 of the United States Bankruptcy Code. On October 6, 2000, the then-Liquidator of NBAT and NBA filed an adversary complaint pursuant to 11 U.S.C. § 523, seeking to deny the Debtor a discharge of certain debts, including the Kentucky judgment described

above. The adversary complaint alleged that the Debtor is not entitled to a discharge pursuant to 11 U.S.C. § 523(a)(2)(A) (false representations or fraud) (Count 1); 11 U.S.C. § 523(a)(4) (defalcation) (Count 2); and 11 U.S.C. § 523(a)(6) (intentional or malicious conduct) (Count 3). [Doc. # 1]

On November 16, 2000, the Debtor filed a Motion for Partial Summary Judgment, alleging that the Kentucky Judgment was dischargeable on the grounds that there were no findings of false representation, fraud, or delfalcation while acting in a fiduciary capacity. [Doc. # 5, 6] The Liquidator filed a response and cross-motion for summary judgment, arguing that the Kentucky judgment was binding and that the debt is nondischargeable under the three enumerated sections of 11 U.S.C. § 523. [Doc. # 11, 12] Following oral argument on the matter, the Bankruptcy Court denied the Debtor's motion and granted the Liquidator's motion. [Doc. # 24] In its order, the Bankruptcy Court concluded that *In re Penick*, 199 B.R. 16 (Bankr. E.D. Ky), *rev'd*, 149 F.3d 1184 (6th Cir. 1998) (unpublished), *cert. denied*, 119 S. Ct. 618, 142 L. Ed. 2d 558 (1999), is the controlling law in this case. The Bankruptcy Court, however, mistakenly interpreted that decision as a reversal of the lower court's decision to dismiss the creditor's claims.

The Debtor filed a Motion for Reconsideration and a separate memorandum regarding *In re Penick*, pointing out that, contrary to the Bankruptcy Court's interpretation, the *Penick* case resulted in reinstatement of the bankruptcy court's dismissal of the creditor's complaint against the *Penick* debtor. The Debtor argued that there was no evidence in the record of fraud or defalcation by the Debtor in the instant

case. The Bankruptcy Court granted the Motion for Reconsideration and vacated its prior order granting the Liquidator's Motion for Summary Judgment. [Doc. # 38] The Court stated that it was not clear at the initial ruling that the district court in *Penick* had reversed the bankruptcy court, and that, thereafter, the Sixth Circuit had reversed the district court and reinstated the bankruptcy court's decision. The Bankruptcy Court again concluded that it "should follow that decision," but now determined that under *Penick*, transfers of corporate assets to its principals do not trigger the nondischargeability provisions of 11 U.S.C. § 523(a). The Liquidator filed a Motion to Reconsider, agreeing that *In re Penick* is the controlling law, but arguing that the application of *Penick* supported a judgment in the Liquidator's favor. [Doc. # 47] After hearing oral arguments on the matter, the Bankruptcy Court denied the Liquidator's Motion for Reconsideration, stating that neither party was entitled to summary judgment. [Doc. # 66]

On February 12, 2002, the parties filed their Joint Pretrial Statement. [Doc. # 64] On February 26, 2002, the Liquidator filed a Motion for Partial Summary Judgment, alleging that because it was established by the Kentucky Court that the Debtor was pursuing and directing the activities of an unauthorized insurer, Kentucky law mandated that the Debtor should be held liable for all unpaid claims or losses incurred. The Liquidator further argued that this debt was nondischargeable pursuant to 11 U.S.C. § 523. The Bankruptcy Court denied the motion. [Doc. # 86]

On July 15, 2002, the Liquidator filed a Statement of Damages. These damages included (1) the Kentucky Judgment in the amount of $833,488.00; (2) the Bonus

Payment in the amount of $362,282.70; (3) transfers from NBA to Debtor and other individuals in the corporation, and to other creditors in the amount of $361,221.76, and (4) 4,010 unpaid claims, which totaled approximately $10,259,656.42.

On January 23, 2003, the Liquidator filed a Renewed Motion for Partial Summary Judgment, agreeing that *Penick* is controlling and arguing that the debt owed by the Debtor was nondischargeable. [Doc. # 99] The Bankruptcy Court denied the motion.

The Liquidator filed a Motion in Limine to preclude the Debtor from introducing evidence that NBAT and NBA were separate legal entities under the doctrine of collateral estoppel because the Kentucky Court had held that they were a single entity. [Doc. # 104]

On March 3, 2003, a three-day trial commenced before the Honorable Redfield T. Baum. On the first day of trial, the Court granted the Liquidator's Motion in Limine. At the conclusion of the evidence, the parties submitted post-trial briefs, and the Court heard closing arguments. Thereafter, the Court took the matter under advisement.

On September 17, 2003, the Bankruptcy Court issued its decision, finding that the June 1989 Bonus Payment of $362,282.70 and the Loan Payments paid between November 1989 and April 1990 totaling $395,000.00 were not dischargeable under Section 523(a)(4). [Doc. # 129] The Court described that portion of the claim for defalcation in a fiduciary capacity as easily decided. Citing *In re Hemmeter*, 242 F.3d 1186 (9th Cir. 2001), the Bankruptcy Court stated that defalcation includes both the misappropriation of

trust funds or money held in any fiduciary capacity and the failure to properly account for such funds. Regardless of intent, the Court continued, defalcation under § 523(a)(4) "is a failure to produce funds entrusted to a fiduciary." The Court concluded that the Bonus Payment and the Loan Payments to the Debtor "constituted defalcations while he was acting in a fiduciary capacity rendering such obligations not dischargeable in his bankruptcy case."

The Bankruptcy Court also concluded that the Debtor's "apparent liability for all of the unpaid claims of NBAT . . . is dischargeable in bankruptcy." Citing *In re Penick*, the Court stated that "[t]he essence of defalcation for bankruptcy discharge purposes is the failure to produce funds entrusted to a fiduciary. This concept does not embrace the normal acts within the business judgment of the fiduciary that, however flawed, do not involve the failure to account for or produce a beneficiary's funds." The Court found that NBAT and NBA could account for or produce the funds entrusted to it. The Court agreed with the conclusion of the U.S. Department of Labor that this was not a case where a subject actively misled the trustees. The Court stated that the NBAT employee benefit program "was simply underfunded by the employers from the outset and that is, at a minimum, one of the reasons for its ultimate and all but certain financial collapse."

The parties filed motions for reconsideration. In the Bankruptcy Court's March 24, 2004 order denying the Liquidator's Motion for Reconsideration, the Court stated that it agreed that the Debtor violated his fiduciary duty of disclosure when he failed to inform the beneficiaries and their employers of the severe financial distress of NBAT. However, the Bankruptcy

Court concluded that it could "not determine from this record the amount of any additional damages that should be declared not discharged . . . ." [Doc. # 149]

The Liquidator filed a Motion for Clarification seeking a finding that the Debtor breached his fiduciary duty to disclose in excess of the ruling already made by the Court in its March 24, 2004 decision or for an evidentiary hearing to determine any addition damages beyond the amounts already set by the Court. The Bankruptcy Court declined to make any further findings. The Court considered the motion for clarification to be a motion for new trial and denied it as being both procedurally and substantively deficient. [Doc. # 153]

On July 9, 2004, the Bankruptcy Court entered its Final Order and Judgment holding that (1) the $362,282.70 Bonus Payment and the Loan Payments of $395,000.00, as well as the applicable pre- and post-judgment thereon, were not dischargeable under 11 U.S.C. § 523(a)(4) because the Debtor committed defalcation in a fiduciary capacity; and (2) the Debtors apparent liability for all of the unpaid claims of NBAT was dischargeable in bankruptcy. [Doc. # 158]

The Debtor filed a timely appeal and the Liquidator filed a timely cross-appeal from the Bankruptcy Court's judgment.

II. ISSUES PRESENTED

A. Issues on Appeal

1. Whether Bankruptcy Court applied the correct standard in determining that the

Debtor's liability for the Bonus Payment and the Loan Payments was nondischargeable under 11 U.S.C. § 523(a)(4);

2. Whether there are sufficient facts in the record to support the Bankruptcy Courts finding that the Bonus Payment and the Loan Payments to the Debtor constituted defalcation while acting in a fiduciary capacity; and

3. Whether the issue regarding the nondischargeability of the Bonus Payment was properly before the Bankruptcy Court.

B. Issue on Cross-Appeal

Whether the Bankruptcy Court erred in finding that the Debtor's apparent liability for all of the unpaid claims of NBAT was dischargeable in bankruptcy.

III. STANDARD OF REVIEW

On appeal from a final judgment, the Court will review the Bankruptcy Court's factual findings for clear error and its legal conclusions *de novo*. *In re Barakat*, 99 F.3d 1520 (9th Cir. 1996).

IV. DISCUSSION

A. The Appeal

The Debtor argues that the Bankruptcy Court failed to apply the correct standard as set forth in *In re Penick* and by the Ninth Circuit in determining that the Debtor's liability for the Bonus Payment and the Loan Payments was nondischargeable under 11 U.S.C. § 523(a)(4). The Debtor asserts that although the Bankruptcy Court acknowledged that the *Penick* case was controlling authority, it ultimately applied an incorrect, and unduly broad, legal standard, i.e., that defalcation under § 523(a)(4) is simply a "failure to produce funds entrusted to a fiduciary."

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." The Ninth Circuit has held that "[t]he broad, general definition of fiduciary–a relationship involving confidence, trust and good faith–is inapplicable in the dischargeability context." *Ragsdale v. Haller*,780 F.2d 794, 796 (9th Cir.1986). Accordingly, in *In re Cantrell*, 329 F.3d 1119, 1125 (9th Cir. 2003), the Ninth Circuit stated that it has "adopted a narrow definition of 'fiduciary' for purposes of § 523(a)(4)." The *Cantrell* court explained that "'[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt.'" *Id.* (quoting *In re Lewis*, 997 F.3d 1182, 1185 (9th Cir. 1996)).

The rule adopted by the Sixth Circuit Court of Appeals, which encompasses the state of Kentucky, is the same as that in the Ninth Circuit. The Sixth Circuit has held that the term "fiduciary" under § 523(a)(4) "applies only to express or technical trusts and does not extend to implied trusts, which are imposed on transactions by operation of law as a

matter of equity." *In re Brady*, 101 F.3d 1165, 1173 (6th Cir. 1996); *Penick*, 199 B.R. at 20.

In *Penick*, the debtor, who was the sole officer, director and shareholder of W. Penick Electrical Construction Co., Inc., filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, Eastern District of Kentucky on March 20, 1995. *Id.* at 18. From 1990 through 1994, the debtor withdrew money via "corporate" checks from the general checking account of Penick Electrical in irregular amounts for use a part from the electrical construction business. *Id.* The withdrawals were entered as loans or "shareholder receivables" on the records of Penick Electrical. *Id.* Peoples Bank made a series of loans to debtor's business. Proceeds from these loans were deposited directly into a general checking account in the name of Penick Electrical. *Id.* at 18-19. In early 1995, Penick Electrical ceased its operations. The business was unable to satisfy its financial obligations to Peoples Bank as those obligations became due. *Id.* at 19. Peoples Bank filed an adversary complaint and a motion for summary judgment, contending that, as a matter of law, the debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(4) because the debtor engaged in defalcation while acting in a fiduciary capacity. *Id.*

The *Penick* court stated that the threshold question to be determined was whether the debtor met the definition of a fiduciary. That court relied on *In re Johnson*, 691 F.2d 249 (6th Cir. 1982), which it characterized as the leading case in the Sixth Circuit on the subject. The *Johnson* court, in interpreting § 17(a)(4) of the Bankruptcy Act, which was the predecessor of 11 U.S.C. §523(a)(4), held that "[t]he

term 'fiduciary' applies only to express or technical trusts and does not extend to implied trusts, which are imposed on transactions by operation of law as a matter of equity. . . . Moreover, the requisite trust relationship must exist prior to the act creating the debt, and without reference to it." *Johnson*, 691 F.2d at 251-52. The *Penick* court stated that it "must therefore discover the existence of a technical trust in order for the debtor to be considered a fiduciary." 199 B.R. at 20.

"Technical trusts are created by an agreement between the parties to impose a trust relationship, or by a statute that specifically imposes fiduciary obligations on a party." *Id.* The plaintiff in *Penick* relied on Kentucky Revised Statute 271B.6-400(3) to establish the trust relationship between the debtor and his creditors that would make the debtor a fiduciary. *Id.* That statute provides that no distribution shall be made if, after giving it effect, the corporation would not be able to pay its debts as they become due in the usual course of business, or if the corporation's total assets would be less than the sum of its total liabilities plus the amount that would be needed to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution. *Id.* The *Penick* court determined that this statute did not create a trust, even though it might infer that a corporate director has a "fiduciary" duty to the corporation's shareholders. *Id.*

The *Penick* court concluded that the plaintiff failed to meet its burden of proof under § 523(a)(4), which "requires the presence of an express trust in order for a debt to be held [non]dischargeable on the grounds

that the debtor engaged in a defalcation while acting in a fiduciary capacity." *Id.* at 20-21 (quoting *In re Sigler*, 196 B.R. 762, 768 (Bkrtcy. W.D. Ky. 1996)). Accordingly, the bankruptcy court found that the debt was not excepted from discharge. *Id.* at 21.

On appeal, the district court reversed *Penick*. However, in an unpublished decision, the Sixth Circuit Court of Appeals reversed the district court and reinstated the *Penick* bankruptcy court decision. *See In re Penick*, 149 F.3d 1184 (6th Cir. 1998). Thereafter, certiorari was denied. *Peoples Bank & Trust Co. of Hazard v. Penick*, 525 U.S. 1055, 119 S. Ct. 618, 142 L. Ed. 2d 58 (1998).

Although the Bankruptcy Court in the present case acknowledged the *Penick* case as controlling authority, the court failed to cite it or apply the standards set forth therein when it rendered its September 17, 2003 decision regarding the Bonus and Loan Payments. Instead, the Bankruptcy Court stated that "defalcation in the context of Section 523(a)(4) is a failure to produce funds entrusted to a fiduciary." The Bankruptcy Court found defalcation based upon the Debtor's conduct in paying himself at a time when NBAT did not have the financial resources to pay claims due to the plan beneficiaries. [Doc. # 129] The Bankruptcy Court, however, made no finding of an express trust, as required by controlling Sixth and Ninth Circuit law. The Bankruptcy Court instead relied on a general definition of a breach of fiduciary duty, a standard that "is inapplicable in the dischargeability context." *Ragsdale*, 780 F.2d at 796.

The Debtor also argues that there are insufficient facts in the record to support the Bankruptcy Court's

finding that the Bonus Payment and the Loan Payments constituted defalcations while acting in a fiduciary capacity. The Debtor points out that NBAT was created by Trust Agreement dated July 24, 1987. [Liquidator's Trial Ex. 9] On or about August 1, 1987, Douglas Walsh, as executive director of NBAT, and NBA, as plan supervisor, entered into an "Agreement for Plan Supervisor," whereby NBA was appointed plan supervisor to, among other things, "market, sell, promote or offer the Plan to employers and/or employees," approve claims, arrange for payment of claims from funds available to the plan, establish the level or amount of contributions to the plan, as well as other administrative tasks asset forth therein. [Liquidator's Trial Ex. 10, Section II] The Agreement for Plan Supervisor expressly provided that NBA is entitled to a fee of 20% of all contributions:

> The Plan Supervisor shall be entitled to a fee for its services to the Plan under this Agreement which shall be payable on a monthly basis and computed at the rate of twenty percent (20%) of all contributions, exclusive of life insurance contributions, received in a given month for all Plan participants who become such subsequent to August 1, 1987.

[*Id.*, Section IV]. The Agreement for Plan Supervisor further provided that NBA shall incur no liability for any act or failure to act not connected with the processing and payment of claims. The Agreement for Plan Supervisor was signed by Mr. Walsh as executive director of NBAT and by the Debtor on behalf of NBA. [*Id.*] The 20% administrative fee was placed in an NBA account for administration and the remaining 80% was placed in a separate NBAT account to pay claims.

The Debtor argues that he was not a trustee with respect to the 20% administrative fee and had no fiduciary duty with respect to the 20% fee, and accordingly, the Bonus and Loan Payments he made to himself from this fee did not constitute defalcation under 11 U.S.C. § 523(A)(4). The Debtor alleges that he owed a fiduciary duty only with respect to the 80% claims portion of the trust. As such, the Debtor maintains that he never received funds from the *res* of the trust because the payments he received were never intended to pay the claims of the plan participants.

The Liquidator argues that because the Bankruptcy Court adopted the Kentucky Court's decision that NBAT and NBA were a single entity, both entities became an express trust. The Liquidator fails to explain, however, how this decision made all funds held in an NBA account trust funds for purposes of § 523(a)(4). If such an effect had automatically occurred, there would have been no need for a trial on the issue of the dischargeability of the Bonus and Loan Payments. However, after the Bankruptcy Court granted the *motion in limine* on the "single entity" issue, it conducted a three-day trial to determine whether payments were improperly made out of an express trust. Moreover, the Court rejected the Liquidator's argument that the single entity issue was dispositive as to the question whether the Debtor was paid out of trust monies and denied her renewed motion for summary judgment on this basis. The Bankruptcy Court noted that under *Penick*, the key element in determining whether a judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(4) "is that the money was taken from a trust fund. . . . And so it would depend on the source of the funds paid to NBAT or NBA that were in turn paid to [the Debtor]."

The Court went on to state that "[o]f the funds that came in, twenty percent were to go to NBA to pay, in effect, their overhead and operations. And so I would presume at this point, that that's not a trust fund, that portion of it." [Doc. # 144, March Transcript, pp. 16-17]

The evidence in the record demonstrates that, as to the 20% Administrative Fee, an express trust was not created: there was (1) no intent to create a trust; (2) no trustee; (3) no trust *res*; and (4) no definite beneficiary. *See In re Blaszak*, 397 F.3d 386, 391-92 (6th Cir. 2005). In an arms-length negotiated agreement, NBA, as plan supervisor, was entitled to take the 20% fee for administrative services. [Liquidator's Trial Ex. 10, Section IV] The plan supervisor could use this money for any purpose, including payment of salaries, bonuses, or compensation to its owners. [Doc. # 145, March 5 Transcript, pp. 18-19] A review of the evidence presented at trial demonstrates that the 20% Administrative Fee was kept in an account separate from the 80% claims portion. Accordingly, there is no evidence in the record to support a finding that with respect to the 20% Administrative Fee, there was an intent to create a trust, that the Debtor was a trustee, that the 20% fee was part of a trust *res*, or that there was a beneficiary -- the evidence demonstrates that it was intended to be the Debtor's money. Moreover, the evidence presented at trial shows that the Debtor received the Bonus Payment and the Loan Payments from the separate account holding the 20% Administrative Fee. In fact, the Liquidator's attorney admitted that the Debtor received no money from the 80% claims portion:

> THE COURT: [A]re you going to put on evidence that he paid this money out of an express trust fund?
>
> MR. JORDAN: The checks did not come out of NBAT's account.

Accordingly, based on the foregoing, the Liquidator failed to meet its burden of establishing the existence of an express trust, and the Bankruptcy Court therefore erred in denying the Debtor a discharge under § 523(a)(4) with respect to the Bonus Payment and the Loan Payments.

In light of the Court's determination above, the Court need not reach the issue whether the nondischargeability of the Bonus Payment was properly before the Bankruptcy Court.

B. The Cross-Appeal

The Liquidator argues that the Bankruptcy Court erred in failing to hold the Debtor's liability for all unpaid claims and losses of NBAT/NBA nondischargeable in bankruptcy. As discussed previously, in its September 17, 2003 order [Doc. # 129], the Bankruptcy Court concluded that the Debtor's "apparent liability for all of the unpaid claims of NBAT . . . is dischargeable in bankruptcy." Citing *In re Hemmeter* and *In re Penick*, the Court stated that "[t]he essence of defalcation for bankruptcy discharge purposes is the failure to produce funds entrusted to a fiduciary. This concept does not embrace the normal acts within the business judgment of the fiduciary that, however flawed, do not involve the failure to account for or produce a beneficiary's funds." The

Bankruptcy Court found that NBAT and NBA could account for or produce the funds entrusted to it. The Court agreed with the conclusion of the U.S. Department of Labor that this was not a case where a subject actively misled the trustees. The Court stated that the NBAT employee benefit program "was simply underfunded by the employers from the outset and that is, at a minimum, one of the reasons for its ultimate and all but certain financial collapse."

The parties filed motions for reconsideration. In the Bankruptcy Court's March 24, 2004 order denying the Liquidator's Motion for Reconsideration [Doc. # 149], the Court stated that it agreed that the Debtor violated his fiduciary duty of disclosure when he failed to inform the beneficiaries and their employers of the severe financial distress of NBAT. However, the Bankruptcy Court concluded that it could "not determine from this record the amount of any additional damages that should be declared not discharged . . . ."

The Bankruptcy Court noted that "this case was not tried based upon the theory of failure to disclose and the damages caused by such failure. Thus there was no damage presentation or exhibit which shows the losses that were incurred after a duty to disclose." The Bankruptcy Court further noted that it was not clear when the duty to disclose arose. The Court stated that the total losses "appear excessive" and pointed out one claim for over one million dollars that appeared to be invalid. Thus, the Bankruptcy Court found that it lacked an evidentiary basis to begin calculating damages. The Court also stated that it had a strong sense that not all of the damages suffered should be assessed to the Debtor and noted that the employers

who turned over their employee benefit plans were "in part responsible for some portion of damages because they apparently failed to ensure that NBAT was able to pay the claims of their employees." Thereafter, the Bankruptcy Court concluded that the Debtor's apparent liability for all of the unpaid claims of NBAT to be dischargeable in bankruptcy.

Assuming without deciding that the Debtor violated his fiduciary duty of disclosure when he failed to inform the beneficiaries and their employers of the severe financial distress of NBAT and thus created potential nondischargeable liability under section 523(a)(4) with respect to subsequent unpaid benefit claims, this Court, sitting as an appellate court, is not in a position to make a determination of the amount of damages to be assessed based on the record before it. The Court agrees with the reasoning of the Bankruptcy Court that because this case was not tried based upon the theory of failure to disclose and the damages caused by such failure, there is insufficient evidence in the record to ascertain precise damages. Accordingly, the Court will affirm the Bankruptcy Court's judgment with respect to this issue.

IV. CONCLUSION

Based on the foregoing,

IT IS ORDERED reversing that part of the Bankruptcy Court's July 9, 2004 Order finding the $362,282.70 Bonus Payment and the Loan Payments of $395,000.00, as well as the applicable pre- and post-judgment interest thereon, not dischargeable under 11 U.S.C. § 523(a)(4). [Doc. # 158]

IT IS FURTHER ORDERED affirming that part of the Bankruptcy Court's July 9, 2004 Order finding that the Debtor's apparent liability for all of the unpaid claims of NBAT was dischargeable in bankruptcy. [Doc. # 158]

In light of the Court's ruling above,

IT IS FURTHER ORDERED denying Appellant's Motion to Strike as moot. [Doc. # 18]

DATED this 25th day of May, 2007.

/s/
Roger G. Strand
Senior United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

CHAPTER: 7
CASE NO. 00-06179-PHX-RTE
ADV. NO. 00-681

[Filed July 9, 2004]

IN RE: ANDREW D. GLOGOWER,	)
	)
Debtor,	)
	)
JANIE A. MILLER, LIQUIDATOR OF NATIONAL BUSINESS ASSOCIATION TRUST and NATIONAL BENEFIT ADMINISTRATORS, INC.,	)
	)
Movant,	)
	)
vs.	)
	)
ANDREW D. GLOGOWER,	)
	)
Debtor/Respondent.	)
	)

FINAL ORDER AND JUDGMENT

This matter was heard before the Court on March 3-5, 2003. Following supplemental briefing, this Court issued a Minute Entry/Order on September 17, 2003, in which it was held that some, but not all, of the Liquidator's claims against the Debtor were not dischargeable in bankruptcy. On September 22, 2003. the Debtor filed a Motion to Reconsider, and on September 26, 2003, the Liquidator filed its Motion to Reconsider. On December 11, 2003, this Court denied the Debtor's Motion for Reconsideration and took the Liquidator's Motion under advisement. Following additional briefing, this Court entered a Minute Entry/Order denying the Liquidator's Motion to Reconsider or March 24, 2004. On March 31, 2004, the Liquidator filed a Motion for Clarification with regard to this Court's March 24, 2004 Minute Entry/Order. On May 18, 2004, this Court entered an Order denying the Liquidator's Motions to Reconsider and for Clarification.

WHEREFORE, the Liquidator's 11 U.S.C. § 523 Complaint having come before the Court for hearing, the parties having submitted briefs on the issues raised therein, the Court having reviewed the evidence, and heard witness testimony and arguments of counsel and otherwise being sufficiently advised, hereby Finds and Orders in accordance with the Minute Entry/Order entered September 17, 2003 as follows:

1. The June 16, 1989 bonus payment of $362,282.70 and the loan payments, paid between November 1989 and April 1990, totaling $395,000.00, as well as the applicable pre- and post-judgment thereon, are not dischargeable in bankruptcy under

11 U.S.C. § 523(a)(4) as the Debtor committed defalcation in a fiduciary capacity in obtaining same.

2. This Court finds and concludes that the Debtor's apparent liability for all of the unpaid claims of NBAT, except as itemized above, is dischargeable in bankruptcy.

3. That this Final Order and Judgment is final and appealable, as there is no just cause for delay.

DATED this 9 day of July, 2004.

/s/
Honorable Redfield T. Baum
U.S. Bankruptcy Judge

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-16188
D.C. No. CV-04-01724-RGS
District of Arizona, Phoenix

[Filed May 11, 2009]

In the Matter of: ANDREW D. GLOGOWER,	)
Debtor,	)
SHARON P. CLARK, Liquidator of National Business Association Trust and National Benefit Administrators,	)
Appellant,	)
v.	)
ANDREW D. GLOGOWER,	)
Appellee.	)

ORDER

Before: D.W. NELSON, W. FLETCHER and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Fletcher and Tallman have voted to deny the petition for rehearing en banc; and Judge Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed April 16, 2009, are DENIED.

The motion for leave to file appendix in support of petition for rehearing and petition for rehearing en banc is DENIED as moot.

APPENDIX E

Constitution and Statutes

Constitution of the United States
Article I, The Congress, Section 8, Clause 4.
Naturalization and Bankruptcy

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—
(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
(B) with respect to which a return, or equivalent report or notice, if required—
(i) was not filed or given; or
(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) (i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $550[1] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $825[1] that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge

under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or
(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—
(A) is for—
(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
(B) results, before, on, or after the date on which the petition was filed, from—
(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
(ii) any settlement agreement entered into by the debtor; or
(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement

payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

11 U.S.C. § 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books,

documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case

commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later

than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c) (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct

of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

APPENDIX F

Agreement For Plan Supervisor

TRIAL 000256, 000260
ER 13, 17

[*see fold-out exhibit next 2 pages*]

AGREEMENT FOR PLAN SUPERVISOR

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SECTION IV.

COSTS OF ADMINISTRATION

The Plan Supervisor shall be entitled to a fee for its services to the Plan under this Agreement which shall be payable on a monthly basis and computed at the rate of twenty percent (20%) of all contributions, exclusive of life insurance contributions, received in a given month for all Plan participants who become such subsequent to August 1, 1987. A sum equal to two percent (2%) of the fee received by the Plan Supervisor hereunder shall be applied to the cost of operation of the Executive Director's office and paid to him on a monthly basis.

These fees shall be due and payable monthly when participation changes are reported as indicated in Section V. paragraph 5.1.

SECTION V.

THE COMPANY

5.1 As of the effective date of this Agreement, if requested, the Company shall provide the Plan Supervisor with a complete list of all employees of the Company who are eligible for benefits from the Plan. Thereafter, the Company shall notify the Plan Supervisor on a monthly basis of all changes in participation whether by reason of termination, change in classification, or any reason.

5.2 The Company shall collect the contributions, if any, made by the employees of the Plan in the manner it may deem appropriate and shall transfer the money so collected to the Plan on a monthly or more frequent basis. The Company, upon notice from the Plan Supervisor, shall pay to the Plan in the manner obligated to pay under the terms of the Plan.

5.3 The Company shall assist in the enrollment of the employees in the Plan, co-operate with the Plan Supervisor with regard to proper settlement of claims, and transmit any inquiries pertaining to the Plan to the Plan Supervisor. The Company shall maintain a supply of forms, enrollment cards or other documents and shall distribute or make available such documents to the employees.

5.4 The Company shall provide directly or through the Plan all materials and documents, including summaries for employees, reports and application and notice forms, as may be necessary or convenient for the operation of the Plan or to satisfy the requirements of governing law as might from time to time be

TRIAL 000260

EP 17

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APPENDIX G

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

90-CI-01207

[Dated June 20, 1991]

ELIZABETH P. WRIGHT,
COMMISSIONER OF THE KENTUCKY
DEPARTMENT OF INSURANCE
PETITIONER

v.

NATIONAL BUSINESS ASSOCIATION
TRUST

and

NATIONAL BENEFIT
ADMINISTRATORS, INC.

and

BENEFAX CORPORATION
RESPONDENTS

ORDER DIRECTING LIQUIDATION OF
NATIONAL BUSINESS ASSOCIATION TRUST

AND DENYING NATIONAL BUSINESS ASSOCIATION TRUST'S MOTION FOR SUMMARY JUDGMENT

Whereas, petitioner Elizabeth P. Wright, Commissioner of the Kentucky Department of Insurance ("Commissioner"), having conducted as thorough an examination as possible into the financial condition of respondent National Business Association Trust ("NBAT");

Whereas, the Commissioner has filed a verified petition for an order directing the liquidation of the respondent; and

Whereas, NBAT has moved for summary judgment on the ground that the petitioner lacks authority to regulate and/or liquidate NBAT in that NBAT is not subject to the jurisdiction of the Insurance Department; and

Whereas, the Court being sufficiently advised and finding that:

1. NBAT is an unauthorized insurer doing business in Kentucky. Due to the loss of its administration contract with NBA and NBA closing its doors, NBAT has no principal offices;

2. NBAT is or may be insolvent;

3. Attempts by the Commissioner to rehabilitate NBAT would be futile and would substantially increase the risk of loss to policyholders and claimants;

4. NBAT is in such financial condition that further transaction of business would be hazardous financially and otherwise to its policyholders, claimants, and other creditors, and to the public in general;

5. Adequate notice and service was made and given to the respondent by service on its attorney or agent for service of process.

THEREFORE, pursuant to KRS 304.33-190 and all other applicable law, IT IS ORDERED AND ADJUDGED that:

1. The Commissioner's motion for an order directing the liquidation of NBAT is GRANTED in all respects;

2. The respondent National Business Association Trust's motion for summary judgment is DENIED;

3. NBAT is insolvent;

4. The Commissioner and her successors in office are appointed liquidator of NBAT and are authorized and directed to take possession of the property of NBAT. The Commissioner is further directed to deal with the property and business of NBAT in the name of the Commissioner, and is vested with title to all property, contracts, rights of action, books, and records of NBAT, wherever located;

5. Formal notice of this order shall be given by the Commissioner by first class mail as prescribed in KRS 304.33-250 to all policyholders, claimants, creditors, and all other persons or entities having any unsatisfied claim or demand of any character against NBAT as disclosed by the books and records of NBAT in the

possession of the Commissioner at the last known address of such persons as disclosed by the books and records, or to my agent or intermediary acting on behalf of potential creditors as directed by any existing treaty or contract in such manner and form as the Commissioner, in her discretion, may find desirable, demanding that all persons indebted to NBAT render accounts of their indebtedness and pay any sums due to the Commissioner, as liquidator. The notice shall further notify creditors to present proofs of claim to the Commissioner, as liquidator, at a time specified within the notice within six months of the effective date of this order, but no later than one year from the effective date of this order. The notice may also contain such other rules, regulations, and information as the Commissioner, as liquidator, may deem necessary for the purpose of this proceeding in fixing and determining all lawful and valid claims and demands against NBAT;

6. The notice referred to in the preceding paragraph shall be given by publication in the Louisville Courier-Journal beginning as soon as practicable after the effective date of this order, and thereafter once a week for six (6) successive weeks;

7. The Notice of liquidation shall be given by publication in such other newspapers and at such times as selected by the Commissioner, as she deems necessary;

8. The notice prescribed in the preceding paragraphs is sufficient notice to all persons interested in the assets of NBAT;

9. All outstanding policies and other insurance obligations of NBAT terminate and all liability thereunder ceases and is fixed as of the date specified in KRS 304.33-210;

10. The rights and liabilities of policyholders, shareholders, and all other persons interested in the estate of NBAT are fixed as of the date of filing of the motion for liquidation, except as provided in the preceding paragraph and in KRS 304.33-210 and 304.33-380;

11. The Commissioner or her successors in office are authorized; permitted and allowed to sell, assign, and transfer any and all stocks, bonds, and securities in her possession or which may hereafter come into her possession belonging to NBAT at market price or better, or when there is no market price at the best price obtainable, at private sale and at such times and upon such terms and conditions as the Commissioner, in her discretion, deems for the best interest of the creditors of NBAT, and that the Commissioner is authorized, permitted, and allowed to take such steps and to make and execute such agreements and other documents as may be necessary to effect and carry out such sales, transfers and assignments;

12. NBA, NBAT, and BeneFax and their officers, directors, trustees, policyholders, agents, employees, managers, and all other persons having property or records belonging to NBAT are directed to assign, transfer, and deliver to the Commissioner, as liquidator, all such property and that any persons, firms, or corporations having any books, papers, or records relating to the business of NBAT shall preserve

them and submit them to the Commissioner, as liquidator, for examination at all reasonable times;

13. The officers, directors, trustees, policyholders, shareholders, managers, and employees of NBA, NBAT, and BeneFax and all other persons are enjoined and restrained from any further transaction of business or from dealing with or disposing of the property or assets of NBAT, or doing or permitting to be done any act or thing which might waste NBAT property or assets or allow or suffer the obtaining of preferences; judgments, attachments, or other liens, or the making of any levy against NBAT, or its estate while in possession and control of the Commissioner, as liquidator;

14. The officers, directors, trustees, policyholders, agents, shareholders, managers, and employees of NBA, NBAT, and BeneFax, and all other persons, including but not limited to, claimants, plaintiffs, and petitioners who have claims against NBAT are permanently enjoined and restrained from bringing or further prosecuting any action at law, suit and equity, special or other proceeding against NBAT or its estate, or the Commissioner and her successors in office, as liquidator thereof, or from making or executing any levy upon the property or estate of NBAT, or from in any way interfering with the Commissioner, or any successor in office, in her possession of the assets of NBAT, or the discharge of her duties as liquidator of NBAT, or in the liquidation of the business of NBAT, unless leave is granted by this Court;

15. The Commissioner, as liquidator, shall honor and pay in full and in priority all expenses incurred by

or at the direction of the Commissioner, as liquidator, as the expenses of administration;

16. The Commissioner shall submit for the Court's approval the names and compensation of any special deputies or counsel to the liquidator;

17. The Commissioner, as liquidator, or her special deputies, counsel, or other designee shall report to the Court on the process of the liquidation of NBAT on a quarterly basis and at such other times as the Court may direct;

18. Nothing herein shall in any way limit the powers or authority given to the Commissioner, as liquidator, in KRS Chapter 304.33 and other applicable laws, and

19. The Commissioner, as liquidator, may at any time make further application for such further or different relief as she sees fit.

This order directing the liquidation of NBAT shall be effective as of 20 June, 1991. This is a final and appealable order and there is no just cause for delay.

SO ORDERED THIS 20th day of JUNE, 1991.

/s/
JUDGE, FRANKLIN CIRCUIT COURT

APPENDIX H

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

90-CI-01207

[Filed May 10, 1991]

ELIZABETH P. WRIGHT,	)
COMMISSIONER OF THE KENTUCKY	)
DEPARTMENT OF INSURANCE[1]	)
PETITIONER	)
	)
v.	)
	)
NATIONAL BUSINESS ASSOCIATION	)
TRUST	)
	)
and	)
	)
NATIONAL BENEFIT	)
ADMINISTRATORS, INC.	)
	)
and	)
	)
BENEFAX CORPORATION	)
RESPONDENTS	)

[1] The Commissioner of the Kentucky Department of Insurances is now Don W. Stephens.

and	)
	)
STOCK YARDS BANK AND	)
TRUST COMPANY	)
INTERVENING RESPONDENT	)
	)
and	)
	)
HERITAGE HEALTH, INC.	)
RESPONDENT	)
	)

ORDER

This action comes before the court upon Petitioner's motion for summary judgment. On June 20, 1991, this court placed National Business Association Trust ("NBAT") into liquidation. That ruling has not been overturned and all statutory limitations for appeal have expired. Petitioner now seeks a ruling from this Court on two issues: (1) the liquidation of National Benefit Administrators, Inc. ("NBA") and (2) the single identity of NBA and NBAT. This matter has been fully briefed, placed under submission on March 22, 1995, and is now ripe for decision.

Petitioner alleges that there is no distinction between NBA and NBAT. In support of his contention, Petitioner asserts that NBA had complete authority to manage the business of NBAT; NBA set the premiums and received the premiums for NBAT; NBA received, adjusted, and settled NBAT claims; only NBA officers and employees had signature authority over NBAT bank accounts; the only representative of NBAT was paid by NBA; the original name of the trust was changed to NBAT to match NBA; and there was no

separation between the bookkeeping function of NBA and NBAT.

In support of his contention that NBA should be liquidated, Petitioner alleges that NBA and NBAT failed to observe the formalities of any separate corporate existence and as such there is no distinction between NBA and NBAT. NBAT has been placed into liquidation, and NBA should not be allowed to escape liability for its actions through NBAT. Thus, NBA should be placed into liquidation with NBAT.

In response to Petitioner's allegations, Respondents state that there has been no opportunity for discovery with regard to the issue of single identity and therefore there may be issues of material fact. Respondents further allege that there is insufficient evidence to support Petitioner's claims; NBA did not have control over NBAT, but rather NBAT's trustees had ultimate control; and there is no proof that NBA was undercapitalized. Thus, summary judgment is premature.

The U.S. District Court for the Western District of Kentucky previously determined that NBA as administrator for NBAT was subject to regulation by state law. (See, National Business Ass'n v. Morgan, 770 F. Supp. 1169 (W. D. Ky. 1991.) In reaching its ruling the court found instructive the ruling in Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2nd Cir. 1987) where in the Court of Appeals stated

> Parties may not use shell-game-like maneuvers to shift fiduciary obligation to one legal entity while channeling profits from self dealing to a separate legal entity under its control.

> The Supreme Court has 'consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.' . . . (citations omitted).

Thus, the U.S. District Court effectively determined that there was no distinction between NBA and NBAT for the application of Kentucky insurance laws.

NBA admits that it managed NBAT pursuant to an administration agreement and maintains that the agreement speaks for itself. The administration agreement provided that NBA had complete and exclusive authority to market NBAT coverage, to set the premiums for NBAT coverage, to collect premiums for NBAT coverage, to receive claims under NBAT coverage, to adjust claims under NBAT coverage, to settle claims under NBAT coverage, to execute documents in the name of NBAT, to receive service of legal process on behalf of NBAT as designated agent, and to otherwise transact the business of NBAT. The unrefuted record shows that NBA had sole control of management of NBAT. NBAT had no offices or operations other than those provided by NBA. NBAT had no employees or officers other than its Executive Director whose sole source of compensation for his activities as Executive Director of NBAT came from NBA under the terms of the administration agreement. Only officers or employees of NBA could sign checks on NBAT's bank accounts. Thus, NBAT acted through and as one with NBA.

The Court next moves to the issue of whether NBA should be placed into liquidation.

In accordance with the Agreement for Plan Supervisor dated August 1, 1987, NBA provided administrative and related services to NBAT. In particular, NBA had full responsibility for arranging for the payment of claims from funds available to NBAT either by issuing a check or draft upon NBAT's bank account; NBA had sole authority to establish the amount of contributions to be made to NBAT by plan participants in accordance with sound and accepted actuarial practice; and NBA had the authority to pay all expenses of operation of the plan from NBAT accounts. This is further evidenced by the signature cards for the NBAT bank account at Stock Yards Bank & Trust Co. which indicate that all persons having signature authority on the NBAT accounts were directors or employees of NBA. Thus, it is apparent that NBA controlled the flow of money into and out of NBAT accounts.

The additional "limited documentary materials" filed as exhibits to NBA's supplemental memorandum support the dominant role of NBA over NBAT as outlined in the Agreement of Plan Supervisor.

On May 2, 1990, NBA ceased doing business. Shortly thereafter, NBAT also ceased doing business. By admission of NBA's own auditors, NBAT made up approximately 90% of NBA's business. Although an audit of NBA was apparently never completed, the partial examination of NBA books and records by Ernst & Young indicated that there was no separation between the bookkeeping function of NBA and NBAT and that without the financial support of NBAT, NBA was not a going concern. NBA was financially dependent upon NBAT revenue and, when NBAT ran

out of money, NBA went out of business, dismissed it employees and sold its office furniture and equipment.

On June 20, 1991, this Court determined that NBAT is insolvent. Due to NBA's financial dependency on NBAT, it naturally follows that NBA is also insolvent.

Respondent argues that there has not been adequate time for discovery and that as NBA's records are in the possession of the Department of Labor, NBA is unable to present the necessary documentation to support its position. Thus, they argue that there may be issues of material fact and summary judgment is premature at this time.

The case of Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991) restated the position of Kentucky courts with respect to summary judgment. In ruling on the standards to be utilized with respect to summary judgment practice in Kentucky courts, the Steelvest Court chose to follow the standard for summary judgment as set forth in the benchmark case of Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Thus, a motion for summary judgment should only be granted

> when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Steelvest, supra, at 483.

Further, while the record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in

his favor, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, supra, at 480, 482.

The Kentucky Court of Appeals has held that it is not necessary for discovery to be completed in order to obtain a summary judgment, but rather than the opposing party had an opportunity to engage in discovery. Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co., Ky.App. 579 S.W.2d 628, 630 (1979).

This action was initiated on July 27, 1990. Further, the motion for summary judgement was originally placed under submission on October 17, 1991. Due to the appeal of a related action, this Court delayed making a determination on this motion for summary judgment until this time. Respondents have had ample opportunity to complete discovery, had have offered no affirmative evidence showing a genuine issue of material fact.

The pleadings and the record show that there is no genuine issue as to any material fact and Petitioner is entitled to a judgment as a matter of law. Accordingly, pursuant to CR 50.03, Petitioner's Motion for Summary Judgment is hereby GRANTED.

Further, it is hereby determined that NBA and NBAT is a single identity; and it is ORDERED, pursuant to KRS Chapter 304.33 that NBA be placed into liquidation under the terms of the June 20, 1991, Order Directing Liquidation of National Business Association Trust.

This is a final and appealable order and there is no just cause for delay.

Done and effective this 9th day of May, 1995.

/s/
JUDGE, FRANKLIN CIRCUIT COURT

APPENDIX I

OLR Case Opening and Information Sheet — U.S. Department of Labor Office of Inspector General

☐ Initial Submission or ☒ Change (Check One)

Date 10/06/92

1. Case #
   90 – CLV – 001

2. Date Opened
   11/27/89

2. Date Reopened

3. Title (Or Lead Subject)
   National Business Association Trust (NBAT)

4. Status (Code):	Enter Date	Enter Date
C	Inactive --	Reactive --

5. Case Agent
   b7 C

6. List Subjects (Last, First, MI)
   GLOGOWER, Andrew
   b7C

7. Nature of Investigation (Enter Code)
   BP

8. O/C Related
Yes (No)

Group (Enter Code)
N/A

9. Industry (Enter code)
H

10. Union (Enter Code)
N/A

11. Joint Agencies (Enter Code)
None

12. Primary? (Enter Code)
N/A

13. List Violations
b5

14. Source (Check One)
***
☒ Other (Explain)
State of Georgia issued a Cease and Desist Order re NBAT

15. Synopsis (500 Character Limit)
Prosecution declined for a number of significant reasons. First, this does not appear to be the case where the subjects actively misled the trustees. b5

Second, while ultimately the trust failed, it had a history of success. The administrative fee charged by the administrators were likewise in conformity with industry standards. Finally, no evidence was developed of skimming or misappropriation of funds.

B7c

Approved by: _____

SAC/SSA

File: 1 - Case File 2- OLRHO
(1 - Case Tracking System)
See Reverse For Codes

[handwritten code unreadable in original]

[Supp. ER 53]

APPENDIX J

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

00-06179-PHX-RTB
ADV. 00-00681

[Dated March 3, 2003]

In re:	)
	)
ANDREW D. GLOGOWER CH. 7	)
	)
1) JANIE A. MILLER vs ANDREW D. GLOGOWER	)
	)
PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE ANY EVIDENCE SUGGESTING THAT NBA & NBAT WERE SEPARATE LEGAL ENTITIES	)
	)
2) JANIE A. MILLER vs ANDREW D. GLOGOWER	)
	)
TRIAL	)

U.S. Bankruptcy Court
2929 N. Central Ave., 9th Floor
Phoenix, AZ 85012

March 3, 2003
9:11 a.m.

BEFORE THE HONORABLE
REDFIELD T. BAUM, Judge

APPEARANCES:

For Janie A. Miller/Plaintiff:

David R. Jordan
TITUS, BRUECKER & BERRY, P.C.
7373 N. Scottsdale Road
Suite B-252
Scottsdale, AZ 85253-3527

For Janie A. Miller:

Greg E. Mitchell
Jan De Beer
(Both by Video Conference)
FROST BROWN TODD, L.L.C.
2700 Lexington Financial Center
250 W. Main Street
Lexington, KY 40507-1749

A/V• •TRONICS, INC.
Professional Court Reporting
& Transcription
Phoenix, AZ

* * *

[p.16]

We then rebriefed the issue. At that point in time, the Judge's order -- if I recall -- stated that at that time you could not find in the record the trust agreement, and accordingly, you didn't feel that you had everything in front of you.

In light of the ruling of the NBA/NBAT being one and the same, those funds all came and went to Mr. Glogower from NBA/NBAT, and in accordance with --

THE COURT: Let me ask you this. Let me ask a question here.

MR. MITCHELL: Yes, sir.

THE COURT: Isn't the judgment out of the state of Kentucky as to the personal liability Mr. Glogower a preference judgment?

MR. MITCHELL: It is, Your Honor. But in accordance with In re Penick, the fact that Mr. Glogower took money, acting in a fiduciary capacity, in order to find a preference judgment under the Kentucky liquidation statute, Judge Graham had to find a number of elements. And that is, he took those monies at a time of which NBA/NBAT was insolvent. In accordance with In re Penick then, that judgment should be nondischargeable.

THE COURT: Well, I guess we're -- I may differ with you, and that view is that as I read Penick, one of the key elements for finding a nondischargeable judgment is that

[p.17]

the money was taken from a trust fund. And I don't recall that the preference judgment or the record indicated the source of the funds that were used to pay Mr. Glogower the payments that were made.

I think -- I assume -- and I have to be candid, I haven't looked in the last couple of days -- that there's no dispute about the payments being made. But under Penick, one element is that the -- and I'm going to quote the second element -- quote, "Relations create an express or implied trust that placed a specific risk in the hands of Penick."

And so it would depend on the source of the funds paid to NBAT or NBA that were in turn paid to Mr. Glogower. At least according to the agreements, he got -- NBA received, I think it was, 20 percent -- I don't know if it was all the funds that came on, but I'm going to refer to it that way. Of the funds that came in, 20 percent were to go to NBA to pay, in effect, their overhead and their operations. And so I would assume, at this point, that that's not a trust fund, that portion of it.

MR. MITCHELL: Your Honor, but with regard to your ruling on the collateral estoppel, Judge Graham's ruling with respect to the single identity addressed the issues with respect to the trust agreement and the plan supervisor agreement that were created in 1997 in the foundation of its ruling that it was a single identity.

* * *

APPENDIX K

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

00-06179-PHX-RTB
ADV. 00-00681

[Dated March 4, 2003]

In re:	)
	)
ANDREW D. GLOGOWER CH. 7	)
	)
JANIE A. MILLER vs ANDREW D. GLOGOWER	)
	)
TRIAL	)
	)

U.S. Bankruptcy Court
2929 N. Central Ave., 9th Floor
Phoenix, AZ 85012

March 4, 2003
1:42 p.m.

BEFORE THE HONORABLE
REDFIELD T. BAUM, Judge

APPEARANCES:

For Janie A. Miller/Plaintiff:

David R. Jordan
TITUS, BRUECKER & BERRY, P.C.
7373 N. Scottsdale Road
Suite B-252
Scottsdale, AZ 85253-3527

For Janie A. Miller:

Greg E. Mitchell
Jan De Beer
(Both by Video Conference)
FROST BROWN TODD, L.L.C.
2700 Lexington Financial Center
250 W. Main Street
Lexington, KY 40507-1749

For Debtor/Defendant:

James P. Kneller
LAW OFFICE OF
JAMES P. KNELLER, P.C.
7509 E. First Street
Scottsdale, AZ 85251

Proceedings recorded by electronic sound technician, Juanita Pierson-Williams; transcript produced by A/V Tronics, Inc.

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* * *

[p.31]

MR. KNELLER: -- the joint pretrial says what the joint pretrial says.

MR. JORDAN: May I respond, Your Honor?

THE COURT: Go ahead.

MR. JORDAN: The entire point of our case is that Mr. Glogower was making payments to himself while acting as -- in a fiduciary capacity. The judgment that we're talking about found that he was liable for these amounts. Now this court --

THE COURT: Let me ask you something. Are you going to put on evidence that he paid this money out of an express trust fund?

MR. JORDAN: The checks did not come out of NBAT's account.

THE COURT: Well, isn't that going to be problematic for the defalcation of the fiduciary capacity?

MR. JORDAN: I don't believe so at all, Your Honor.

THE COURT: Well, you know --

MR. JORDAN: And this is the reason --

THE COURT: -- Penick says you got show the -- an express trust.

MR. JORDAN: Your Honor, this is the whole reason I'm going into what I'm going into right now. I mean you're really addressing the whole reason this whole line of questioning is occurring. It is our intent to demonstrate

* * *

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-16188
San Francisco, CA

[Dated February 12, 2009]

In the Matter of:	)
ANDREW D. GLOGOWER,	)
	)
Debtor,	)
	)
SHARON P. CLARK, Liquidator of	)
National Business Association Trust	)
and National Benefit Administrators,	)
	)
Appellant,	)
	)
v.	)
	)
ANDREW D. GLOGOWER,	)
	)
Appellee.	)
	)

TRANSCRIPT OF APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ROGER G. STRAND, DISTRICT JUDGE, PRESIDING

BEFORE: D.W. NELSON, W. FLETCHER AND R. TALLMAN, CIRCUIT JUDGES

APPEARANCES:

For the Appellant:

By: Greg E. Mitchell
FROST BROWN TODD LLC
250 W. Main St.
2700 Lexington Financial Center
Lexington, KY 40507-1749

For the Appellee:

By: Kathi M. Sandweiss
JABURG & WILK, P. C.
3200 N. Central Ave., Ste. 2000
Phoenix, AZ 85012

Transcription Service:

AVTranz
365 E. Coronado Rd., Ste. #100
Phoenix, AZ 85004-1525

Proceedings recorded by electronic sound recording, transcript produced by transcription services.

[p.2] February 12, 2009

MR. MITCHELL: Please the Court. Good morning, Your Honor. Name is Greg Mitchell. I'm here on behalf of the National Association Business Trust, the liquidator, which is a state court insolvency proceeding. This matter concerns § 523(a)(4), discharge proceeding. This is an appeal by us, the liquidator, with regard to the overturning of findings of facts and conclusions and order of a bankruptcy court in Arizona, finding that the debt in question was nondischargeable in the bankruptcy proceeding.

JUDGE TALLMAN: So your client is the Commissioner of Insurance for Kentucky, who has been appointed as the liquidator; is that correct?

MR. MITCHELL: Yes, sir. That's correct, Your Honor. It's a state court insurance liquidation proceeding under state court insurance insolvency matters. The commissioner in that capacity acts as the liquidator, as appointed by the statutory reference. It's a separate scheme outside of the bankruptcy code dealing specifically with insurers; and in this case even more so, which is how important this case is, is it's an unauthorized insurer.

JUDGE TALLMAN: Mr. Mitchell, if we can sort of get right to the heart of it here.

MR. MITCHELL: Yes, sir.

JUDGE TALLMAN: The Franklin County Circuit Court [p.3] made a factual finding that NBAT and NBA were one in the same entity.

MR. MITCHELL: Yes, sir.

JUDGE TALLMAN: I read that as being the alter ego, pierce the veil, whatever you want to call it. It's just one organization.

MR. MITCHELL: Yes, sir.

JUDGE TALLMAN: Is that right?

MR. MITCHELL: Yes, sir.

JUDGE TALLMAN: And then on top of that we have the fact that Mr. Glogower did not bother to comply with any of the insurance regulations of the State of Kentucky, so he wasn't even a legitimate insurance company when he opened for business?

MR. MITCHELL: That's correct.

JUDGE TALLMAN: Okay. So the question is what is the effect of that factual finding on United States Bankruptcy and District Courts in the District of Arizona. Do they have to give full faith and credit to that factual finding as to the issue of being one in the same for purposes of assessing fiduciary obligations under ERISA. Have I got this right?

MR. MITCHELL: Yes, sir, absolutely. We believe absolutely, because in this case -- and obviously it's very difficult in the context of unauthorized insurers, where they set up a third party administrator and then you have a trust

* * *

[p.19] later. It was made after these -- after the payment was made to the 20 percent trust, and certainly long after these bonus and loan payments were made out of the 20 percent trust. There's no evidence of misappropriation of the funds in the 80 percent. And without a plan administrator --

JUDGE TALLMAN: It's --

MS. SANDWEISS: -- without employees --

JUDGE TALLMAN: Counsel, it's not a misappropriation. Nobody's accusing Mr. Glogower of theft. He's accused of breach of his fiduciary duty. It's called a defalcation in the law. And that is not misappropriation or theft. It's simply an improper use of trust money to pay a non-claim use.

MS. SANDWEISS: That's right, but the trust -- the express trust has to exist before the wrongdoing. And I know Your Honor is saying that it did. The 80 percent/20 percent existed. The 20 percent was always Mr. Glogower's money. It was never trust money. And so what we're trying to do here, what the liquidator's trying to do and what the Court is talking about doing is imposing -- there's some sense in the air of there was wrongdoing, the plan failed, there wasn't enough money to pay the claims out of the 80 percent.

JUDGE TALLMAN: Well, that in part is a breach of the fiduciary duty, is it not, the failure to properly underwrite the insurance risk so that you collect sufficient premiums from the employers to see to it that all of the anticipated claims [p.20] will be paid? Mr. Glogower breached his fiduciary obligation in that regard as well, did he not?

MS. SANDWEISS: That's not the standard though under § 523. That may or may not be a standard of breach of fiduciary duty, and it may have been a breach under the unauthorized insurance laws. But remember, this is not a Kentucky state law case.

JUDGE TALLMAN: Well --

MS. SANDWEISS: We're just talking about the specific requirements under § 523. And so whether or not there was a breach as to whether Mr. Glogower should or should not have asked the claimants for more money to be paid in higher premiums, maybe he should have, but that's not an issue that was tried in this case.

JUDGE TALLMAN: But one of the things that he didn't do was he didn't tell the trustees of the ERISA plan that there was not enough money to pay the claims. And that's another breach of fiduciary duty, is it not?

MS. SANDWEISS: No. Your Honor, with all due respect, first of all, that issue was not preserved in the joint pretrial statement. And that's important, because there was not evidence in the record as to that. Mr. Glogower was questioned and the questioning was -- went something like isn't it true that you didn't notify the trustees, and Mr. Glogower responded no, that's not true.

* * *

APPENDIX M

Frost Brown Todd LLC
Attorneys

KENTUCKY · OHIO · INDIANA · TENNESSEE · WEST VIRGINIA

Greg E. Mitchell
(859) 244-7548
GMITCHELL@FBTLAW.COM

VIA ELECTRONIC FILING

May 21, 2009

Molly C. Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Sharon P. Clark, Appellant v. Glogower, Appellee United States Court of Appeals for the Ninth Circuit Case No. 07-16188

Dear Ms. Dwyer:

Pursuant to 9th Cir. R. 36-4, the Appellant, Sharon P. Clark, Commissioner of the Kentucky Department of Insurance, in her capacity as Liquidator of the National Business Association Trust/National Benefit Administrators (hereinafter the "Appellant"), hereby

respectfully requests that this Court's April 3, 2009 disposition in the above-referenced matter be re-designated as an opinion and subsequently published. See **Attachment A**. In support of her request, the Appellant states as follows:

On April 3, 2009, this Court entered a Memorandum in which it vacated the judgment of the District Court and remanded the case with instructions to reinstate the judgment of the Bankruptcy Court. In entering this ruling, the United States Court of Appeals for the Ninth Circuit ***made a number of critical holdings pertinent to states' power to regulate insolvency and liquidation and the 11 U.S.C. § 523(a)(4) dischargeability of debts incurred by an Employment Retirement Incomes Security Act ("ERISA") fiduciary***. In light of the paucity of available case law on this issue, especially as it relates to unauthorized insurance trusts, the Appellant strongly urges the publication of the Court's ruling in the above-referenced matter.

In its criteria for publication, this Court has stated that it will publish a written, reasoned disposition as an Opinion if it "[. . .][i]nvolves a legal or factual issue of unique interest or substantial public importance [. . .]." See 9th Cir. R. 36-2. The Appellant reiterates that the ruling in this matter does more than simply resolve a long-standing dischargeability case—as is evidenced by the National Association of Insurance Commissioner's ("NAIC") willingness to file an *amicus curiae* brief in support of the Appellant's position. Rather, the outcome of this case will impact the state-based system of insurer insolvency regulation—with particular relevance to the

accountability of insurance trust fiduciaries to their policyholders.

In the Memorandum in question, the Court reiterated its position that a fiduciary under ERISA is a fiduciary under 11 U.S.C. § 523(a)(4) and that a fiduciary cannot use administrative accounts or other legal fictions to obfuscate his legal duties and obligations. Although prior case law such as In re Hemmerter, 242 F.3d 11,86, 1190 (9th Cir. 2001), has held that an ERISA fiduciary is also an § 523(a)(4) fiduciary, ***this case is the first instance to which this principle has been applied to a fiduciary who committed defalcation through an administrative entity under his complete control and authority***.

If the District Court's prior ruling had been allowed to stand, it would have created a legal loophole to facilitate unauthorized insurance and/or the misuse of insurance funds. In effect, the District Court's decision allowed those fiduciaries with control of money paid to insurance trusts by policyholders (be such a trust authorized or unauthorized under existing law) to siphon off such funds for their own personal use. According to the District Court, such activity did not constitute defalcation as long as the insurance trust was structured in such a way as to place an intermediate step between the trust and the fiduciary.

In the matter at hand, the $757,282.70 in loan and bonus payments were made to the fiduciary from an unauthorized insurance trust's administrative entity. According to the District Court's reasoning, because the money went from the Trust to the administrator, and then to the fiduciary, the debts in question were dischargeable. In contrast, if the money had gone

directly from the Trust to the fiduciary, the debts in question would be non-dischargeable under 11 U.S.C. § 523(a)(4). This reasoning incentivises insurance trust fiduciaries to structure separate administrative entities (over which they have complete control and authority) into which they can methodically transfer trust funds (regardless of whether the trust can meet its insurance obligations to policyholders). Once the monies are transferred into such administrative entities, they are no longer considered trust funds and can be spent on a host of otherwise unauthorized activities (e.g., exorbitant bonus payments, unreasonable salaries, etc.). This glaring loophole could obstruct ongoing efforts to effectively regulate the insurance industry as it permits shell-game-like maneuvers—shifting fiduciary obligations to one legal entity while channeling profits from self-dealing to a separate legal entity under their control.

In arriving at the decision that the fiduciaries debts were dischargeable under 11 U.S.C. § 523(a)(4), the District Court completely ignored the Kentucky state court determination that, due to their complete and total interdependence, the trust and administrator *were a single entity as a matter of law*. In fact, the United States Bankruptcy Court for the District of Arizona, despite granting a motion in limine to exclude any evidence attempting to show that the trust and administrator were not one, wanted to hear testimony on whether the "administrative fee" paid to the administrator by the trust constituted trust fund money.

In contrast, this Court applied the doctrine of full faith and credit to the Kentucky state court's earlier determination that the trust and administrator were

one and the same entity. In so doing, the Court correctly noted that "[o]nce the corporate veil has been pierced, there is no legally relevant distinction between the funds used to pay NBA [the administrator] and the funds used to pay beneficiaries." The United States Court of Appeals for the Ninth Circuit's deference to the Kentucky state court on this issue (especially in light of the Bankruptcy and District Courts' refusal to invoke the Full Faith and Credit Doctrine) is of critical importance to the effective regulation of the insurance industry.

Under the current regulatory structure, state courts are provided with judicial oversight over that state's insurance code. Generally, state law directs actions pertinent to the regulation and enforcement of that state's insurance code to a specific court (or judicial body such as the Virginia state Corporation Commission) with advanced knowledge of the nuances of that specific state's insurance laws. Although the McCarran-Ferguson Act (as well as elements of the Gramm-Leach Bliley Act) has enabled the federal preemption of certain aspects of insurance regulation, state courts still play a central role in the regulatory oversight of the insurance industry. As recognized in this Court's ruling, in instances such as the matter at hand, federal courts should provide state court decisions pertinent to non-preempted aspects of insurance regulation with full faith and credit as called for under the United States Constitution. Such deference is even more appropriate where the state court has specific, detailed knowledge on the area of the law it is ruling upon.

The United States Court of Appeals for the Ninth Circuit's explicit provision of full faith and credit to the

Kentucky state court's ruling on the structure of the insurance trust and administrator in question is critical to the effective control of unauthorized insurance. If, as in the matter at hand, federal Bankruptcy and District Courts' continue to insist that unauthorized insurers are not collaterally estopped from re-litigating critical facts previously ruled upon in state court proceedings, then time-consuming and potentially confusing testimony will continue to hamper regulators' efforts to curb unauthorized insurance and hold fiduciaries accountable to their policyholders. As such, it is of the utmost importance that state court rulings on this issue are observed and given the weight they are constitutionally owed.

As you will note from a review of the record, the NAIC obtained leave of court to file an *amicus curiae* brief in this case.[1] In its motion for leave, the NAIC stated that its "[. . .] interest in this case arises from the regulatory responsibilities vested in its members to preside over insurer liquidation and insolvency." See NAIC February 4, 2008 Motion for Leave, a copy of which is attached hereto as **Attachment B**. In its Motion, the NAIC listed a number of reasons that this Court should entertain its arguments in support of the Appellant in this matter. Specifically, the NAIC argued that "[t]his Court's disposition addresses key rulings made by the Kentucky Circuit Court that were not given due deference in bankruptcy proceedings." Id. As noted by the NAIC, its "[m]embers are vitally

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[1] The NAIC is a Delaware non-profit corporation whose membership consists of the principal insurance regulatory officials in the fifty (50) States, the District of Columbia, and the territories.

interested in the deference shown to the states' power to regulate insolvency and liquidation, a power which is granted by the McCarran-Ferguson Act and the Bankruptcy Code." Id. In addition, the NAIC stated that this case "[. . .] also examines the enforceability of the Non-admitted Insurance Model Act and the threat posed by this case to effective state-based regulation of insurer insolvency." Id. Obviously, the NAIC believes that this matter "[i]nvolves a legal or factual issue of unique interest or substantial public importance [. . .]" mandating publication. See 9th Cir. R. 36-2. As such, it filed an *amicus curiae* brief "[. . .] to assist the court on these issues *from a national perspective and with an eye toward public policy*." Id. (emphasis added).

In close, the Appellant argues that the interest in the effective regulation of the insurance industry strongly urges the publication of an Opinion in this matter. At the current time, there is an absence of substantial legal precedent in the area of unauthorized insurance which results in a significant amount of speculative litigation and vitiates any potential deterrent effect on potential wrongdoers. Therefore, it is important for the effective regulation of the insurance industry—especially in the area of unauthorized insurance—that a strong body of case law with legal precedent be created.

Therefore, in order to further the pervasive public interest in the effective regulation of the insurance industry through the creation of a strong body of case law, the Plaintiff urges the Court to amend its Opinion and designate the above-captioned case as "To Be Published."

Very truly yours,

/s/Greg E. Mitchell

* * *

[Certificate of Service omitted in printing of this appendix]

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-16188
D.C. No. CV-04-01724-RGS
District of Arizona, Phoenix

[Filed May 26, 2009]

In the Matter of: ANDREW D. GLOGOWER, Debtor, SHARON P. CLARK, Liquidator of National Business Association Trust and National Benefit Administrators, Appellant, v. ANDREW D. GLOGOWER, Appellee.	)

Before: D.W. NELSON, W. FLETCHER and TALLMAN, Circuit Judges.

ORDER

Appellant's request for publication, filed May 21, 2009, is hereby DENIED.